



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS**  
**JUDICIAL REVIEW DIVISION**  
**MISC. CIVIL APPL. NO. 178 OF 2011**

**BETWEEN**

**GEORGE OWALLA OKEYO.....APPLICANT**

**AND**

**DIRECTOR OF PENSIONS .....1<sup>ST</sup> RESPONDENT**

**HON ATTORNEY GENERAL .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The *ex-parte* applicant ('the applicant') moved the court by a notice of motion dated 16<sup>th</sup> August 2011 seeking the following order;
  1. *An order of mandamus do issue directing and compelling the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to pay to the applicant his full pension gratuity in the sum of Kshs 1,600,000 or thereabouts, together with the accrued monthly pension and monthly pensions of Ksh. 16,000 together with interest thereon at 14% per annum from October 2008 or effective date until payment in full.*
  2. *The Respondents do pay the costs of this application and of the application for leave.*
2. *The application is supported by the applicant's affidavit sworn on 11<sup>th</sup> July 2011 and the grounds on the face of the motion which are as follows;*
  - a. *The applicant retired from the Public Service having lastly worked with the Ministry of Health.*
  - b. *The 1<sup>st</sup> Respondent has refused to compute and pay to the applicant his pension gratuity and monthly pension to date or has computed but refused to pay to the applicant his pension gratuity and monthly pension from his effective date to date.*
  - c. *The 1<sup>st</sup> Respondent has not given a justifiable or proper reasons for the failure to perform the statutory duty.*
  - d. *The 1<sup>st</sup> Respondent has despite demand made failed to account and pay the requested dues and persists in the neglect.*
  - e. *It is only though the grant of this application and orders prayed for that the 1<sup>st</sup> Respondent can*

*perform the statutory duty imposed on him to pay to the applicant his dues on threat of execution being levied against him.*

3. In the course of the proceedings, the applicant filed a supplementary affidavit sworn on 14<sup>th</sup> November 2012, in which he confirmed that he had been paid Kshs. 1,253,595.10. He claimed that the respondent had withheld the sum of Kshs. 599,365.05 which he claimed was due and owing.
4. The Pensions Secretary and Director of Pensions, Ms Anne Mugo, swore a replying affidavit in which she deponed that the applicant was awarded a pension gratuity from 1<sup>st</sup> August 2004. She denies that the Department owes the applicant Kshs.600,000.00.
5. When the matter came up for hearing on 14<sup>th</sup> May 2014, I directed the parties to meet and resolve the matter as I was of the view that the real dispute concerned accounting which is a matter that would be resolved amicably by studying the applicant's pension account. It appears that the parties have not made any headway in resolving the issue.
6. Mr Oduk, counsel for the applicant, states that the issue is one of withheld pension and from the discussions with the 1<sup>st</sup> respondent, the starting monthly pension should have been Kshs.12,670.71 but the applicant was paid Kshs. 8,447.10. He therefore seeks payment of the difference. He also claims that he is entitled to bi-annual increases which should be taken into account and which have not been accounted for. Counsel confirms that the applicant now receives his monthly pension which is Kshs.15,438.00. He prays that the Director should now calculate the outstanding sum taking into account the annual increments or adjustments. He also seeks costs in the matter as this matter would have been settled earlier without the court's intervention.
7. Learned counsel for the respondent, Ms Cheruiyot states that the Director of Pensions denies owing the applicant any money. Following discussions held after the court direction, counsel submitted that the Director formed the opinion that the matter is entirely settled. She submitted that the Director is the repository of pension accounts and it is the office to calculate the pension owed and determine how much should be paid.
8. In ***Kenya National Examinations Council v Republic ex-parte Gathenji and Others CA Civil Appeal No. 266 of 1996 [1997]eKLR***, the Court of Appeal addressed the scope of an order of mandamus, "*What is the scope and efficacy of an ORDER OF MANDAMUS .....*" "*The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.*" ..... [A]n order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."
9. In this matter it cannot be said that the respondent has failed to perform its duty. What is left is a matter of accounting and the court cannot direct the respondent to pay a sum of money that remains in dispute. I would have dismissed the application but I am cognisant of the duty of the court under **Article 159(2)** of the Constitution and also the duty of the Court must do justice to the parties hence the order I have made in the matter. Any disputed amount ought to be recovered as a civil debt. The grant of an order of mandamus in such a case is to enforce payment of a specific sum that has been ascertained. If there is a dispute as to the amount due and owing then the issue must be determined in ordinary proceedings.

10. As regards costs, this matter was instituted by the applicant as a result of the respondent's failure to pay the applicant his pension gratuity. A substantial sum was paid in October 2011 after the application was filed and the applicant confirms that he now receives his pension. I will therefore award him costs but assess the same at Kshs. 50,000 all inclusive.

11. In the final analysis, the Notice of Motion dated 16<sup>th</sup> August 2011 is determined on the following terms;

1. **The 1<sup>st</sup> respondent shall furnish the applicant a statement of his pension account reflecting the payments made and indicating the necessary adjustments/increments from the date of commencement of payments to date within 14 days from the date hereof.**
2. **The 1<sup>st</sup> respondent shall pay the applicant costs of the application assessed at Kshs. 50,000 all inclusive.**

**DATED and DELIVERED AT NAIROBI this 28<sup>th</sup> May 2014.**

**D.S. MAJANJA**

**JUDGE**

Mr Oduk instructed by Oduk and Company Advocates for the ex-parte applicant.

Ms Cheruiyot, Litigation Counsel, instructed by the State Law Office, for the respondents.